

**The owners of the ship or vessel MT 'Rowan' v
The owners of the ship or vessel or property
'Singapura Timur' (Jabatan Laut Semenanjung
Malaysia, Intervener)**

HIGH COURT (MELAKA) — ADMIRALTY IN REM NO 27-1 OF 2001
LOW HOP BING J
13 JANUARY 2004

Civil Procedure — Trial — Further evidence — Adducing fresh evidence — Whether evidence available and could have been obtained earlier — Application for leave to adduce further evidence by filing affidavits — Introduction of sub judice evidence in criminal trial — Whether such sub judice evidence amounted to fresh evidence — Whether requirements in Ladd v Marshall satisfied — Rules of the High Court 1980 O 56 r 1(3A)

Civil Procedure — Appeal — Adducing fresh evidence — Whether evidence was available at hearing before registrar if reasonable diligence used — Whether appellate court should exercise discretion to allow fresh evidence to be used — Principles applicable — Whether requirements in Ladd v Marshall satisfied — Rules of the High Court 1980 O 56 r 1(3A)

The plaintiff commenced a suit against the defendant claiming compensation for loss and damage suffered arising out of a collision which occurred in the Straits of Malacca between their vessels. After service of the writ in rem, the plaintiff filed an application seeking an order that the Marine Department disclose certain documents known as the Vessel Traffic Information System ('VTIS') printouts relating to the positions of the two vessels up to the collision and transcripts of the VHP conversations recorded between the two vessels and the VTIS section. The object of the application was to make available to the court independent evidence of how the collision occurred so that apportionment of liability for the collision between the parties could be established. The Marine Department intervened to oppose the application on the grounds that the VTIS documents were to be used in certain magistrate's court summonses cases preferred against the master and second officer of the MT Rowan for alleged breaches of the Collision Regulations. They alleged that disclosure of these documents would prejudice the prosecution's case. The application was heard and dismissed with costs by the registrar and the plaintiff appealed. In the meanwhile, at a hearing of the aforesaid magistrate's court summonses, the Marine Department produced some extracts of the VTIS records. The accused in those summonses then applied for and obtained an order from the magistrate's court that the officer of the Marine Department do also disclose other particularized extracts of the VTIS printouts, which were then produced. The plaintiff now applied to enable these facts to be put before this court. The Marine Department objected on the additional grounds the further affidavit was not fresh evidence and so did not comply with the requirements under O 56 r 1(3A) of the Rules of the High Court 1980. They also contended that the further affidavit was sub judice the prosecution in the magistrate's court of the master and second officer of the MT Rowan.

A Held, allowing the application in part:

(1) Order 56 r 1(3A) is a statutory codification of the principles laid down in *Ladd v Marshall* [1954] 3 All ER 745 that fresh evidence is not admissible on the hearing of an appeal unless the conditions set out therein are met. *Lau Foo Sun v Government of Malaysia* [1970] 2 MLJ 70 referred, *Milik Perusahaan Sdn Bhd And Anor v Kembang Masyur Sdn Bhd* [2003] 1 MLJ 5 followed (see para 14).

B

(2) The general rule under O 56 r 1(3A), is that fresh evidence shall not be admissible unless the person seeking to admit such evidence satisfies the court that the evidence was not available to him at the time of the trial and that reasonable diligence would not have made it so available and, further, that such evidence, if true, would have had, or have been likely to have had, a determining influence upon the trial judge's decision (see para 15).

C

(3) The evidence in the documents sought to be admitted was clearly not available to the plaintiff and that reasonable diligence would not have made it so available. These documents, if true, would likely have had a determining influence upon the registrar's decision (see para 15).

D

(4) Since criminal proceedings were pending in the magistrate's court against the master and the second officer of the MT Rowan and the MT Rowan is the plaintiff herein, the matter was within the doctrine of sub judice. Be that as it may, the proceedings pending in the magistrate's court have seen the admissibility of particularized extracts of the VTIS printouts. There was no reason why these printouts could not or should not be admitted and be used in the present civil proceedings (see paras 22–23).

E

(5) The plaintiff's application was allowed to the extent that the plaintiff was permitted to file a further affidavit, annexing the printouts produced by the Marine Department in the criminal proceedings in the magistrate's court against the master and second officer of the MT Rowan. The intervener was also granted leave to file an affidavit in reply thereto (see para 24).

F

(6) Since the criminal proceedings were still pending in the magistrate's court, and by way of a practical solution to the sub judice issue, it was further ordered that the plaintiff's application for the Marine Department's documents and the appeal against the decision of the registrar be heard after the conclusion of the criminal proceedings in the magistrate's court. In the event of an appeal against the decision of the magistrate's court, that appeal shall be heard by the same trial judge hearing the application and appeal (see para 25).

G

H

[Bahasa Malaysia summary]

I Plaintiff telah memulakan satu guaman terhadap defendan untuk pampasan untuk kerugian dan kerosakan yang berbangkit daripada satu pelanggaran yang berlaku di Selat Melaka di antara kedua-dua kapal mereka. Selepas penyampaian writ in rem, plaintiff telah memfailkan satu permohonan

memohon perintah bahawa Jabatan Laut mendedahkan dokumen-dokumen yang dikenali sebagai cetakan 'Traffic Information System ('VTIS') yang berkenaan kedudukan kedua-dua kapal itu sehingga pelanggaran dan salinan perbualan VHP yang dirakam di antara kedua-dua kapal itu dan seksyen VTIS. Matlamat permohonan itu adalah untuk mengemukakan keterangan mengenai bagaimana pelanggaran itu berlaku supaya liabiliti dapat diagih. Jabatan Laut telah mencelah untuk membangkang kepada permohonan itu pada alasan yang dokumen-dokumen VTIS hendak digunakan di dalam kes-kes saman di dalam mahkamah majistret terhadap nakhoda dan pegawai kedua kapal MT Rowan untuk pelanggaran Peraturan-Peraturan Pelanggaran yang dikatakan. Mereka telah menyatakan bahawa pendedahan dokumen-dokumen itu akan memprejudiskan kes pendakwaan. Permohonan itu telah didengar dan ditolak oleh pendaftar dan plaintif merayu. Sementara itu di dalam pendengaran saman-saman mahkamah majistret yang dikatakan, Jabatan Laut telah mengemukakan petikan daripada rekod-rekod VTIS. Tertuduh di dalam saman-saman itu juga telah memohon dan mendapatkan perintah daripada mahkamah majistret untuk pegawai Jabatan Laut mendedahkan petikan-petikan cetakan VTIS yang diperincikan, yang telah dikemukakan. Plaintif memohon supaya fakta-fakta ini dikemukakan di dalam mahkamah ini. Jabatan Laut membantah pada alasan yang fakta-fakta ini bukan keterangan baru dan tidak mematuhi peruntukan di bawah A 56 k 1(3A) Kaedah-Kaedah Mahkamah Tinggi 1980. Mereka juga menyatakan bahawa affidavit lanjutan adalah sub judice pendakwaan nakhoda dan pegawai kedua MT Rowan di dalam mahkamah majistret.

Diputusan, membenarkan sebahagian daripada permohonan itu:

- (1) Aturan 56 k 1(3A) adalah pengkuanan statutori prinsip-prinsip di dalam *Ladd v Marshall* [1954] 3 All ER 745 bahawa keterangan baru tidak dapat dikemukakan pada pendengaran rayuan kecuali jika keadaan-keadaan di dalam Aturan itu dipatuhi (lihat perenggan 14); *Lau Foo Sun v Government of Malaysia* [1970] 2 MLJ 70 dirujuk, *Milik Perusahaan Sdn Bhd & Anor v Kembang Masyur Sdn Bhd* [2003] 1 MLJ 6 diikuti.
- (2) Peraturan am di bawah A 56 k 1(3A) adalah keterangan baru tidak dapat dikemukakan kecuali orang yang hendak mengemukakan keterangan itu memuaskan mahkamah bahawa keterangan itu tidak dapat diperoleh pada masa perbicaraan dan ketekunan yang munasabah tidak dapat menjadikannya ada dan, selanjutnya, keterangan itu, jika benar, akan mempunyai atau mungkin mempunyai pengaruh penentu ke atas keputusan hakim (lihat perenggan 15).
- (3) Keterangan di dalam dokumen-dokumen yang hendak dikemukakan jelas tidak dapat didapati oleh plaintif dan ketekunan yang munasabah tidak dapat menjadikannya ada. Dokumen-dokumen ini, jika benar, akan mempunyai pengaruh penentu ke atas keputusan pendaftar (lihat perenggan 15).

- A** (4) Memandangkan bahawa prosiding jenayah masih belum selesai di dalam mahkamah majistret terhadap nakhoda dan pegawai kedua MT Rowan, dan MT Rowan merupakan plaintif, perkara ini termasuk ke dalam doktrin sub judice. Walau bagaimanapun, petikan-petikan cetakan VTIS yang diperincikan telah dibenarkan di dalam prosiding yang masih belum selesai di dalam mahkamah majistret. Tiada alasan-alasan mengapa dokumen-dokumen ini tidak boleh dikemukakan di dalam prosiding sivil ini (lihat perenggan-perenggan 22–23).
- B**
- (5) Permohonan plaintif telah dibenarkan ke tahap plaintif dibenarkan memfailkan affidavit lanjutan, melampirkan cetakan yang dikemukakan oleh Jabatan Laut di dalam prosiding jenayah di mahkamah majistret terhadap nakhoda dan pegawai kedua MT Rowan. Pencelah juga dibenarkan memfailkan affidavit jawapan (lihat perenggan 24).
- C**
- (6) Memandangkan prosiding jenayah masih belum selesai di mahkamah majistret, dan untuk menyelesaikan isu sub judice, ia diperintahkan bahawa permohonan plaintif untuk dokumen-dokumen Jabatan Laut dan rayuan terhadap keputusan pendaftar didengar selepas penyelesaian prosiding jenayah di mahkamah majistret. Jika terdapat rayuan terhadap keputusan mahkamah majistret, rayuan terhadap keputusan mahkamah majistret akan didengar selepas penyelesaian prosiding jenayah di mahkamah majistret. Jika terdapat rayuan terhadap keputusan mahkamah majistret, rayuan itu akan didengar oleh hakim yang mendengar permohonan dan rayuan (lihat perenggan 25).]
- D**
- E**

Notes

- F** For cases on further evidence in trials, see 2 *Mallal's Digest* (4th Ed 2001 Reissue) paras 6415-6416.
For cases on adducing fresh evidence in appeals, see 2 *Mallal's Digest* (4th Ed 2001 Reissue) paras 529-548.

G Cases referred to

- Attorney-General v Times Newspapers Ltd* [1973] 1 QB 710 (refd)
Fresh Food & Refrigerating Co, Ltd v Syme & Co — Behr Mathew Ltd, ... Third Parties [1935] 1 MLJ 196 (refd)
Ladd v Marshall [1954] 3 All ER 745 (refd)
Lau Foo Sun v Government of Malaysia [1970] 2 MLJ 70 (refd)
- H** *Lim Hong Kee David, Re* [1995] 4 MLJ 564 (refd)
Milik Perusahaan Sdn Bhd & Anor v Kembang Masyur Sdn Bhd [2003] 1 MLJ 6 (folld)
Punca Klasik Sdn Bhd v Seok Kim Leow [1996] 5 MLJ 241 (refd)
R v Duffy and Others, ex p Nash [1960] 2 QB 188 (refd)

I

Legislation referred to

Rules of the High Court 1980 O 56 r 1(3A)

Shukriah Hamidah bte Mohamad (Federal Counsel, Jabatan Laut Semenanjung Malaysia) for the intervener. **A**
Arun Krishnalingam (Sativale Mathew Arun) for the plaintiff.
Jainil Bhandari (Lee Ong & Kandiah) for the defendant.

Low Hop Bing J:

B

APPLICATION

[1] This is an application in encl (76) filed by the plaintiff for leave to file a further affidavit to be read at the hearing of the plaintiff's notice of appeal to the judge in chambers in encl (48) and the plaintiff's summons in chambers in encl (25), and for an order that costs be in the cause. **C**

FACTUAL BACKGROUND

[2] The plaintiff commenced this suit against the defendant to claim for loss and damage suffered by the plaintiff arising out of a collision which occurred in the Straits of Malacca on 28 May 2001 between the vessels 'Rowan' and 'Singapura Timur'. **D**

[3] After service of the writ in rem, the plaintiff filed the application under encl (25) ('the application') on 19 July 2001 to seek an order that the Marine Department disclose to this court the documents known as the Vessel Traffic Information System ('VTIS') printouts relating to the positions of Rowan and Singapura Timur up to the collision and transcripts of the VHP conversations recorded between Rowan and Singapura Timur, the two vessels, and the VTIS section. The object of the application was to make available to the court independent evidence of how the collision occurred so that the apportionment of liability between the plaintiff and the defendant for the collision could be established. **E**
F

[4] The Marine Department intervened in this action and opposed the application, and filed one affidavit in reply, affirmed by one Rossid bin Musa on 17 August 2001 raising two grounds in opposition, viz :

- (1) that the VTIS documents will be used in the Melaka Magistrate's Court Summons Cases No 87-1619-2001 and 87-1620-2001 preferred against the master and second officer of Rowan for alleged breaches of the Collision Regulations and the disclosure of these documents will prejudice the prosecution's case; **G**
- (2) that the Marine Department did not have total custody and control over the requested documents. **H**

[5] The application was heard and dismissed with costs by the learned registrar on 1 October 2001. Against that dismissal, the plaintiff filed the appeal in encl (48) on 4 October 2001.

[6] Meanwhile, at the hearing of the aforesaid magistrate's court summonses on 14 January 2003, the Marine Department produced some extracts of the VTIS records. The accused in those summonses then applied **I**

- A** and obtained an order from the magistrate's court that one Capt Jailani bin Jallal of the Marine Department do disclose other particularized extracts of the VTIS printouts, which were produced.

[7] The plaintiff now applied vide encl (76) to enable the plaintiff to put these facts before this court.

B

OBJECTION BY MARINE DEPARTMENT

- [8]** In objecting to encl (78), learned Federal Counsel, Cik Shukriah Hamidah bte Mohamad, submitted that the further affidavit is sub judice the prosecution's case which is pending in the magistrate's court against the master and second officer of Rowan. Reliance was placed on *R v Duffy and Others, ex p Nash* [1960] 2 QB 188; and *Attorney-General v Times Newspapers Ltd* [1973] 1 QB 710.
- C**

- [9]** It was also submitted for the intervener that the further affidavit was not fresh evidence and so did not comply with the requirements under O 56 r 1(3A) of the Rules of the High Court 1980. For this submission, *Ladd v Marshall* [1954] 3 All ER 745; *Milik Perusahaan Sdn Bhd & Anor v Kembang Masyur Sdn Bhd* [2003] 1 MLJ 6; *Fresh Food & Refrigerating Co, Ltd v Syme & Co — Behr Mathew Ltd, ... Third Parties* [1935] 1 MLJ 196; and *Re Lim Hong Kee David* [1995] 4 MLJ 564 were cited in support.
- D**

- [10]** It was next argued that the grounds as stated by the said Rossid bin Musa in encl (36) still apply.
- E**

SUBMISSION FOR PLAINTIFF

- [11]** Mr Arun Krishnalingam, learned counsel for the plaintiff, relied on O 56 r 3(A) (when it should have been O 56 r 1(3A) and *Punca Klasik Sdn Bhd v Seok Kim Leow* [1996] 5 MLJ 241; *Re Lim Hong Kee David* and *Milik Perusahaan Sdn Bhd*, adding that the proposed further affidavit would contain fresh evidence which was not available at the time of the initial hearing before the learned registrar, as the events leading to the criminal proceedings before the learned magistrate occurred after the decision by the learned registrar, and that the fresh evidence would have had a determining influence on the decision of the learned registrar.
- F**
- G**

- [12]** On the issue of sub judice, it was contended that the proposed further affidavit did not have any impact on the proceedings in the magistrate's court in determining the guilt or innocence of the two accused before the magistrate's court.
- H**

DECISION ON ENCLOSURE (76)

Issues for determination

- I** **[13]** There are two issues for determination by me, viz :

- (1) whether the plaintiff has satisfied the requirements of O 56 r 1(3A) in order to obtain leave to file the proposed further affidavit;

- (2) whether the filing and the consideration of the proposed further affidavit by this court is sub judice the proceedings in the magistrate's court. **A**

O 56 r 1(3A)

1 Appeals from certain decisions of Registrar to Judge in Chambers (O 56 r 1) **B**

- (1) ...
- (2) ...
- (3) ...

(3A) At the hearing of the appeal fresh evidence shall not be admitted unless the Judge is satisfied that - **C**

- (a) at the hearing before the Registrar the new evidence was not available to the party seeking to use it, or that reasonable diligence would not have made it so available; and **D**
- (b) the fresh evidence, if true, would have had or would have been likely to have had a determining influence upon the decision of the Registrar. **D**

[14] In *Milik Perusahaan*, the Court of Appeal through the judgment of Gopal Sri Ram JCA at p 11H affirmed that O 56 r 1(3A) is a statutory codification of the principles laid down by the English Court of Appeal in *Ladd v Marshall*, and that fresh evidence is not admissible unless the conditions set out in *Ladd v Marshall* are met (see *Lau Foo Sun v Government of Malaysia* [1970] 2 MLJ 70). **E**

[15] Under O 56 r 1(3A), the general rule is that fresh evidence shall not be admitted. I venture to add that exceptionally, such evidence may be admitted if the judge is satisfied that the person seeking to invoke the provisions of O 56 r 1(3A), ie the plaintiff herein has fulfilled the requirements thereunder. The burden is therefore on the plaintiff to aver in the affidavit in support that he has satisfied these requirements viz : **F**

- (a) the new evidence was not available to the plaintiff or that reasonable diligence would not have made it so available; and
- (b) that evidence, if true, would have had or have been likely to have had a determining influence upon the registrar's decision. **G**

[16] In arriving at a decision under O 56 r 1(3A), the judge must weigh all the facts and circumstances prevailing in a particular case in order to arrive at a conclusion as to whether the facts and circumstances have fulfilled the aforesaid requirements. **H**

[17] In *Puncak Klasik Sdn Bhd*, the defendant applied to produce new documents, but the affidavit in support contained no averment that the new evidence was not available to the defendant at the hearing before the registrar nor was there any averment that reasonable diligence would not have made them available. Hence, Abdul Malik Ishak J disallowed the admissibility of new documents since the requirements under O 56 r 1(3A) have not been fulfilled. **I**

- A** [18] In *Lim Hong Kee David*, there was an attempt in September 1995 by the appellant to file an affidavit in the course of an appeal against the registrar's decision to a judge in chambers, but the respondent opposed the admissibility of the affidavit. The registrar's decision was delivered on 4 April 1995. In considering whether the appellant has fulfilled one of the requirements, ie reasonable diligence under O 56 r 1(3A)(a), Kamalanathan Ratnam JC (now J) explained at p 572F–G, inter alia, as follows:
- B**

Diligence means industry. It is a steady, earnest and meticulous pursuit towards the attainment of one's goal. In the context of obtaining the fresh evidence that is intended to be adduced, the party seeking to make such an introduction ought to satisfy the court that he has made all reasonable cogent and positive efforts in the pursuit of obtaining the best evidence to prove his case. It is his duty to show to the court that neither indolence nor a lackadaisical attitude predominated in the preparation of his case ...

- C**
- D** [19] The learned judge followed the principles enunciated by the Federal Court in the judgment of Suffian FJ (later LP) in *Lau Foo Sun*, and *Ladd v Marshall*, as codified in O 56 r 1(3A). On the facts in *Re Lim Hong Kee David*, the affidavit was not admitted as the evidence could have been obtained with reasonable diligence before trial.

- E** [20] Reverting to the factual background in encl (78), it is clear to me that the fresh evidence in the documents sought to be admitted by the plaintiff was not available to the plaintiff or that reasonable diligence would not have made it so available and that these documents, if true, would have had or would have been likely to have a determining influence upon the learned registrar's decision.

SUB JUDICE

- F** [21] The submissions for both the plaintiff and the intervener respectively demonstrate considerable consensus in relation to the principles of law governing the ambit and purview of the doctrine of sub judice. At this juncture, it is beneficial to restate the doctrine as follows:
- G**
- (1) Sub judice literally means in the course of trial.
- H**
- (2) The doctrine of sub judice is usually invoked in the law relating to contempt of court eg, in the publication of an article in a newspaper while litigation or proceedings in court are sub judice when in all the circumstances existing as at the date of the publication, the article was intended or calculated to prejudice the fair hearing of the litigation or proceedings in court: *R v Duffy*, per Lord Parker CJ at p 894H.
- I**
- (3) When litigation is pending and actively in suit before the court, no one shall comment on it in such a way that there is a real and substantial danger of prejudice to the trial of the action, as for instance by influencing the judge, the jurors, or the witnesses, or even by prejudicing mankind in general against a party to the cause. Even if the person making the comment honestly believes it to be true, still it is contempt of court if he prejudices the truth before it is ascertained in

the proceedings. To that rule about a fair trial, there is this further rule about bringing pressure to bear on one of the parties to a cause so as to force him to drop his complaint, or to give up his defence, or to come to a settlement on terms which he would not otherwise have been prepared to entertain. The law should be maintained in its full integrity. We must not allow 'trial by newspaper' or 'trial by television' or 'trial by any medium' other than the courts of law. This law applies only when litigation is pending and is actively in suit before the court and there must appear to be 'a real and substantial danger of prejudice' to the trial of the cause or matter or to the settlement of it: per Lord Denning MR in *Attorney-General v Times Newspapers*.

[22] Since criminal proceedings are pending in the magistrate's court against the master and the second officer of the Rowan and the Rowan is the plaintiff herein, the matter is in my view within the doctrine of sub judice. Those criminal proceedings must proceed and be brought to their logical conclusion by way of due process of law.

[23] Be that as it may, the proceedings pending in the magistrate's court have seen the admissibility of particularized extracts of the VTIS printouts, which are at this juncture already before the magistrate's court. In my view, there is no reason why these printouts cannot or should not be admitted and be used in the proceedings before me.

CONCLUSION

[24] On the foregoing grounds, I allow the plaintiff's application in encl (76) to the extent that the plaintiff is hereby allowed to file a further affidavit to annex the printouts produced by the Marine Department in the criminal proceedings pending against the master and second officer of the Rowan in the magistrate's court and the intervener is also granted leave to file an affidavit in reply thereto.

[25] In view of the fact that the said criminal proceedings are pending in the magistrate's court, and by way of a practical solution to the sub judice issue, I further order that the plaintiff's appeal in encl (48) and the application in encl (25) herein be heard after the conclusion of the criminal proceedings in the magistrate's court and that in the interest of justice, in the event of any appeal by either the prosecution or the defence against the decision of the magistrate's court, that appeal shall be heard by the same judge hearing encl (48) and (25) herein.

[26] Costs in the cause.

Application allowed in part.

Reported by Sivapragasam Kumaran

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